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No. 80-1980

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

ABCO BUS CO., INC.,

Petitioner,

- against -

FRANK J. MACCHIAROLA, individually and as Chancellor of the Board of Education of the City of New York, and DAVID WOLOVICK, individually, and as Director of the Bureau of Supplies of the Board of Education of the City of New York, and FLORENCE FLAST, individually and as Director of Pupil Transportation of the Board of Education of the City of New York and THE BOARD OF EDUCATION OF THE CITY OF NEW YORK,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO A PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK STATE

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No. 80-1880

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

ABCO BUS CO., INC.,

Petitioner,

- against -

FRANK J. MACCHIAROLA, individually and as Chancellor of the Board of Education of the City of New York, and DAVID WOLOVICK, individually, and as Director of the Bureau of Supplies of the Board of Education of the City of New York, and FLORENCE FLAST, individually and as Director of Pupil Transportation of the Board of Education of the City of New York and THE BOARD OF EDUCATION OF THE CITY OF NEW YORK,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO A PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK STATE

QUESTIONS PRESENTED

1. Was petitioner entitled to advance notice of the standards to be applied by the Board

in ascertaining whether a bidder was "responsible" so that the failure to give such notice constituted a violation of petitioner's right to due process?

2. Does the record substantiate petitioner's claim that the Board's standards were unevenly applied without a rational basis so as to constitute a violation of petitioner's right to equal protection?

3. Did the New York Court of Appeals violate petitioner's rights under the Eighth Amendment to the United States Constitution?

STATEMENT OF THE CASE

Petitioner, formerly the holder of a contract to furnish transportation for handicapped children in the New York City school system which expired in 1979, submitted a bid for certain specific routes pursuant to a revised contract solicitation for the years 1979-1983 (A11-A13).*

After opening the bids for the various routes, the Board instructed the New York City Department of Investigation (hereinafter "D.O.I.") to investigate the principals and stockholders of the low bidders, of which petitioner was one, with a view towards determining whether the companies were the "lowest responsible bidders" in accordance with the contract and New York Education Law §305(14)(a) and General Municipal Law §103(1), that is, whether they possessed both financial and moral worth. It was the policy of the Board of Education not to

*Numbers preceded by an "A" are references to the Appendix; numbers followed by "a" are references to the appendix to the Petition unless otherwise noted.

award contracts to otherwise successful bidders if they did not meet the highest moral standards (A32). The Board had determined that such standards would not be met if the principals or stockholders of the companies in question had records of criminal convictions (A46; Transcript of Hearing held before Slavin, J. on August 13, 1979, pp. 37, 81-82, 90, hereinafter cited as "Hearing") .

As a result of D.O.I.'s inquiry, it was learned that two of the three stockholders of petitioner, Lawrence Paladino and Lorenzo Lampasi, had been convicted of crimes. Accordingly, petitioner was informed by letter dated June 29, 1979, that it would not be receiving the pupil transportation contract on which it was low bidder (A19). Petitioner thereafter requested an administrative appeal before respondents' Board of Review pursuant to Section 8.3 of the By-laws of the New York City Board of Education (A12-13). A hearing was held on

July 5, 1979 (A22-90), at which petitioner was represented by counsel.

At the hearing, Detective Poulos of D.O.I. testified that Lawrence Paladino had pled guilty in September 1976 in federal court to conspiracy to obstruct, delay, and affect commerce through extortion, in violation of United States Code, Title 18, §1951 (A38). The extortion involved the trucking industry. Paladino also pleaded guilty in 1976 to one count of income tax evasion (A38-39). In 1971, Paladino had also accepted a guilty plea to possession of stolen credit cards (A42).

Lorenzo Lampasi had been convicted in 1970 of falsifying government records, in that, in 1964, he had used funds obtained under an FHA loan for other than the intended purposes (A43, 97, Hearing, p. 60).

On these uncontroverted, documented facts, the Board of Review, in a memorandum to Chancellor Macchiarola, sustained the decision to disqualify

petitioner from being awarded a contract (A95-99). The Board of Review also found that the policy in question had been applied to all bidders uniformly (A98-99).

Following commencement of the instant Article 78 proceeding in New York Supreme Court, a hearing was held on August 13, 1979. Sheldon Rosenblum, Assistant Director of the Commercial Division of respondents' Office of Legal Services, testified that as a result of discussions with respondent Florence Flast, Director of the Bureau of Pupil Transportation, as to the meaning of the term "responsible bidder" (Hearing, p. 34), it was ultimately declared to be the policy of the Board of Education that "responsible bidder", as a term of art, would retain the same meaning previously ascribed to it by the cases, that is, financial and moral responsibility (A34-35, 37). One of the factors to be considered in determining whether the bidder was "responsible", however, was whether the

D.O.I. investigators discovered evidence of criminal convictions against any of the principals or stockholders of the low bidders.

On December 21, 1978, all prospective bidders were invited to attend a conference at which the proposed specifications were reviewed "page by page" (Hearing, p. 41). With respect to the term "responsible bidder", the prospective bidders were apprised that a thorough investigation as to the finances of the bidder would be made by the Board's Office of Auditor General, and that there would be a thorough background investigation made of the contractor, its principals and shareholders (Hearing, p. 42).

Following the bid openings in the latter part of February 1979, and the receipt of a D.O.I. investigation report in April, at a meeting in June 1979, the initial decision to disqualify a bidder, based upon the type and age of the conviction against a particular principal, was made (Hearing, pp. 50-52). Mr. Rosenblum testified that the D.O.I.

had uncovered discrediting information on the following bidders: ABCO Bus Co., Inc.; Able Bus, Inc.; Chief Transportation Corp.; Dash Transportation, Inc.; Omega Transportation Co., Inc.; Terry's Transportation; and Tufaro Transit Co. (Hearing, p. 55). None of the above, save ABCO and Omega, were disqualified because no sufficiently recent criminal convictions were found against the principals or stockholders of the companies to warrant disqualification. In Tufaro's case, a 23-year-old conviction for possession of a firearm, for which a $100 fine had been imposed, was considered too remote to be a ground for disqualification (Hearing, p. 58). The sole principal of Terry's Transportation had been charged with harassment, resisting arrest, operating a motor vehicle without a license, and leaving the scene of an accident; but, since it could not be ascertained to which count he had pled guilty, and in light of his sworn testimony before

the D.O.I. that it was to the motor vehicle charge, the Board decided to take no action to disqualify (Hearing, pp. 57-58). No convictions were found against the principal operator of Able Bus Co., although it was disclosed that in May 1977 he had asserted his Fifth Amendment rights at a D.O.I. interview (Hearing, pp. 73, 76). In the case of Chief Transportation Co., the Board of Review overturned the Board of Education's determination to disqualify based upon the absence of a conviction against its principal who had been dismissed from the Police Department, allegedly for accepting a bribe (Hearing, pp. 56-57). There was no derrogatory evidence found with respect to Dash Transportation (Hearing, p. 59).

Petitioner did not call any witnesses or submit any evidence.

Based upon its finding that petitioner had never been given advance notice of the standard to be applied by the Board in determining responsibil-

ity (2a-3a), and that the standards had not been applied uniformly (4a-5a), and that the Board had therefore acted arbitrarily and capriciously (5a), the New York Supreme Court (SLAVIN, J.) annulled the Board's determination to deny the contract to petitioner and, incorrectly treating the contracts as having actually been awarded and rescinded (A105), ordered the Board to honor its contract, provided Lawrence Paladino, the shareholder with the more serious conviction, divested himself of his shares within six months of the date of the court's decision (A5-6). 100 Misc. 2d 712, 420 NYS 2d 123 (Sup. Ct., Kings Co., 1979).

The Appellate Division of the New York Supreme Court affirmed the finding that respondents had acted arbitrarily and capriciously primarily based upon the failure of respondents to give petitioner advance notice of the standard of responsibility and because of the failure to disqualify other bidders whose principals had criminal records.

Justice Hopkins dissented, finding that a rational basis existed for respondents' determination and that the court was, therefore, powerless to interfere in the legitimate exercise of administrative discretion (11a-12a). 75 AD 2d 831, 427 NYS 2d 876 (2d Dept., 1980).*

The New York Court of Appeals unanimously reversed "for reasons stated in the dissenting memorandum by Mr. Justice James D. Hopkins at the Appellate Division". 52 NY 2d 938, 419 NE 2d 870 (1981), mot. for rearg. den.,___NY 2d___ (April 7, 1981).

*Due to errors in the reproduction of the Appellate Division opinions in petitioner's petition, the texts of those opinions are being reproduced in an appendix hereto.

REASONS FOR DENYING A WRIT OF CERTIORARI

NO FEDERAL QUESTIONS HAVE BEEN BEEN ARTICULATED WHICH REQUIRE REVIEW BY THIS COURT

(1)

The thrust of petitioner's petition for a writ of certiorari appears to be that it was denied due process when the standards by which the responsibility of the bidder was measured were changed by respondents without prior notice to petitioner. This issue was properly decided by the New York Court of Appeals in respondents' favor. Adopting the dissenting opinion of Justice Hopkins of the Appellate Division, Second Department, the Court of Appeals unanimously found that it was within respondents' administrative authority and discretion to determine the standards to be applied, to change such standards when it deemed it appropriate or necessary to do so, and to exercise reasonable discretion in measuring each bidder against those standards (10a-12a).

The breadth of administrative discretion in matters involving local contracts is clearly a question of state law. Although petitioner had formerly been awarded a contract by respondents, that contract was due to expire prior to the commencement of the new contract term. Petitioner did not possess any property rights with respect to the new contract and did not have a legally-cognizable interest superior to any other bidder. See Board of Regents v. Roth, 408 U.S. 564, 577-578 (1972). Petitioner's position was not, like the cases cited in its petition (p. 13), that of a licensee who has a vested right to perform particular services and to whom advance notice and a hearing is due prior to revocation of that right. See e.g., In re Carter, 177 F. 2d 75,78 (D.C. Cir., 1949), cert. den., 338 U.S. 900 (1949). Petitioner was not "entitled" as low bidder, to a binding contract (Petition at 12); rather, any expectation of award remained at all

times subject to its meeting the Board's criteria of "responsible", a factual matter consistently deferred to the discretion of the local government. See New Orleans v. Dukes, 427 U.S. 297, 303 (1976); Atkin v. Kansas, 191 U.S. 207, 222-223 (1903); Image Carrier Corp. v. Beame, 567 F. 2d 1197 (2d Cir., 1977), cert. den. sub nom Image Carrier Corp. v. Koch, 440 U.S. 979 (1979); American Yearbook Co. Inc. v. Askew, 339 F. Supp. 719, 722-723 (M.D. Fla., 1972, three-judge court), aff'd w/o opin., 409 U.S. 904 (1972). Thus, since there exists no right to do business with the government (Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 312-314 (1976); Perkins v. Lukens Steel Co., 310 U.S. 113 (1940)), and petitioner was accorded both administrative due process with respect to its disqualification pursuant to the standard established and state judicial review of the administrative action, it cannot be said that its rights have been violated

under federal law. See Perry v. Sindermann, 408 U.S. 593 (1972).

Gonzalez v. Freeman, 334 F. Supp. 570 (D.C. Cir., 1964), cited by petitioner (Petition at 16), is not to the contrary since there, the appellant had been barred from government employment without any opportunity to challenge the evidence; here, the evidence of conviction is clear and uncontested and petitioner has been accorded substantial due process.*

(2)

Petitioner also takes issue with the application by the Board of its standard of responsibility claiming that other bidders were awarded contracts despite evidence of criminal activity.

*It is noted that the propriety of the standard itself has not been challenged and, since the individual principals whose criminal records caused petitioner's disqualification were not parties to this litigation, the rights at issue are only those of the corporation.

The testimony indicates that only convictions were used as a basis for disqualification of bidders, not merely criminal records, i.e., arrests or indictments alone. Thus, petitioner's citations to Dash Transportation, which had not been awarded a contract, Able Bus Co., whose principal had previously taken his Fifth Amendment privilege in another context (Petition at 6-7, 11; Hearing, pp. 53-54), and Chief Transportation Inc., about which little is revealed except that no contract had as yet been awarded and the offending principal had not been criminally prosecuted (Petition at 11; Hearing, p. 53), are all irrelevant. Only Terry's Transportation Co. and Tufaro Transportation Co., of those cited, are even arguably in the same category as petitioner. These two were not disqualified based upon the second-stage evaluation, the age and seriousness of the crimes (Hearing, pp. 50-51).

The principal of Terry's Transportation had been charged with harassment, resisting arrest, operating a motor vehicle without a license, and leaving the scene of an accident, but had pleaded guilty only to the motor vehicle charge - a misdemeanor - and, therefore, Terry's was not disqualified. The principal of Tufaro Transit Company had a 23-year-old conviction for possession of a firearm for which be was fined $100. In considering the age and seriousness of the crime, it was decided not to disqualify that bidder.

> When local economic regulation is challenged solely as violating the Equal Protection Clause, this Court consistently defers to legislative determinations as to the desirability of particular statutory discriminations. See, e.g., Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356 (1973). Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legiti-

mate state interest. New Orleans v. Dukes, supra, 427 U.S. at 303.

There is not even a scintilla of evidence in the record at bar to suggest that petitioner's disqualification was motivated by other than the application of the standard of "responsibility" as defined by respondents. The fact that petitioner's principals' criminal convictions were found to be of such character and vintage as to require its disqualification in no way reflects a relationship to an inherently suspect distinction such as race, religion or alienage; nor are petitioner's First Amendment rights alleged to have been affected by the respondents' decision. Clearly, "the exclusionary line challenged...'is not directed "against" any individual or category of persons, but rather it represents a policy choice... made by that branch of government vested with the power to make such choices'." New York City Transit Authority v. Beazer, 440 U.S. 568, 592 (1979), quoting, Marshall v. United States, 414 U.S. 417,

428 (1974). Such circumstances do not present a constitutional question (440 U.S. at 593).

(3)

The Eighth Amendment to the United States Constitution is clearly inapplicable to the case at bar, particularly since the individuals whose criminal convictions caused petitioner's disqualification are not even parties to the suit.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

July 9, 1981

Respectfully submitted,

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LEONARD KOERNER,
CAROLYN E. DEMAREST,
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DECISION OF THE APPELLATE DIVISION

In a proceeding pursuant to CPLR article 78 to compel the Board of Education of the City of New York (board) to award petitioner, Abco Bus Co., Inc. (Abco), a transportation contract, the appeal is from a judgment of the Supreme Court, Kings County (SLAVIN, J.), entered September 7, 1979, which awarded Abco the contract on condition that one of its shareholders, Lawrence Paladino, divest himself of his interest in the corporation.

Judgment affirmed, without costs or disbursements.

Abco was formed in 1971. It had a total of three shareholders: Lorenzo Lampazi, who owned 50% of its shares, and Lawrence Paladino and Jacqueline Greenberg, each of whom owned 25% of the shares. Since 1971 Abco had been satisfactorily transporting handicapped children for the Board of Education pursuant to a contract that had an expiration date in June, 1979.

Prior thereto the board invited bids for the transportation of handicapped pupils for the period of September, 1979, through June, 1982. Under sections entitled "Award," the proposals, inter alia, stated the following:

> "The award of Contract, if made, will be made according to law, as soon after the opening of bids as practicable, by item, to the lowest responsible bidder offering the lowest weighted average daily rate per vehicle for extended and regular service as specified in each item."
> (Emphasis supplied.)

Abco submitted a bid pursuant to the proposal which turned out to be a successful low bid on the routes in issue. The board then had the New York City Department of Investigation do a background check on the principals of Abco. On May 9, 1979 the Department of Investigation conducted a hearing as a result of which it was established that only Lampazi was involved in the day to day operations of Abco; that he had been convicted in 1970 of falsifying information on a 1964 application for a

Federal Housing Administration loan (he used the loan proceeds to pay doctor bills arising from his wife's pregnancy rather than for the stated purpose of modernizing his home); and that in 1975 he had been arrested and charged with the offense of driving while intoxicated which was disposed of by a conditional discharge and a $100 fine. As to Paladino, the Department of Investigation learned that in 1971 he pleaded guilty to a charge of possession of stolen property and was fined $250; that in 1976 he was convicted of income tax evasion and conspiracy involving the use of extortion to obstruct interstate commerce; and that in 1978 he violated his probation by associating with individuals having criminal records.

Subsequent to the completion of the investigation the board informed Abco, first orally and then by letter dated June 29, 1979, that it would not "be receiving an Award of Contract."

Abco sought and received administrative review of the denial. Moreover, Abso offered to have Paladino divest himself of his interest in the company if that would enable it to be awarded the contract.* Nevertheless, the board adhered to its position stating that principals of Abco have records of criminal convictions and that disqualification of bidders with such problems is being uniformly applied.

Thereupon, in August, 1979, Abco commenced this proceeding asserting that the board was acting arbitrarily and capriciously in refusing to award it a contract. A trial was held, the record of which shows that 1979 was the first year in which the board had instructed the Department of Investigation to investigate the backgrounds of

* We note that Abco has not cross-appealed from the judgment under review nor is Paladino a party to this proceeding. Therefore we have not addressed ourselves to whether Special Term erred in conditioning the award of the contract to Abco on Paladino's divesting himself of his interest in the firm.

successful bidders and that in June, 1979 the board established an internal policy that it would be reasonable to deem a corporate bidder "irresponsible" if any of its principals had a criminal record. More significantly, the evidence adduced showed that other bidders were awarded transportation contracts although their principals also had criminal records.

Based on the foregoing, we conclude that the board acted arbitrarily and capriciously in refusing to award a contract to Abco.

It is clear that a board of education has the authority and duty to award contracts for the transportation of school children to the lowest responsible bidder in accordance with the best interests of the school district involved (cf. Education Law, §305, subd 14, par a; General Municipal Law, §103, subd 1). We of course agree with the board that in determining whether a low bidder is responsible, moral character, including

prior criminal activities, depending on their nature, is a valid criterion (see Matter of Dellwood Foods v Board of Educ. of Hendrick Hudson School Dist., 97 Misc 2d 751; Matter of Limitone v Galgano, 21 Misc 2d 376). In Varsity Tr. v Saporita (71 AD2d 643, affd 48 NY2d 767) we recognized the wide authority vested in the board to make contract proposals that are required by the public interest. However, fundamental fairness requires that once such proposals are drawn and bid on, the board abide by its proposals and treat bidders uniformly.

The board, by its February 22, 1979 invitation for bids, required that the bidder be responsible. Abco, having satisfactorily served the board since 1971, had every right to assume that it was responsible and that its effort in making the bid would not be for naught. Nowhere did the board indicate that a bid would be rejected because a principal of the bidder had a criminal record. For

this reason we cannot countenance the application of the standard which the board seeks to impose on Abco. We are fortified in this view by the long satisfactory service Abco rendered the board, and by the fact that the crimes with which Abco's principals were charged are not of a type which make it clear that Abco is unable to responsibly or safely transport school children.

Finally, any doubt as to the arbitrariness of the board's action is obviated by its acceptance of bids from other corporations whose principals have records of criminal activities.

Accordingly, we affirm the judgment appealed from.

DAMIANI, TITONE and MARTUSCELLO, JJ., concur.

HOPKINS, J.P., dissents and votes to reverse the judgment and to dismiss the proceeding on the merits, with the following memorandum:

A municipal contract subject to the requirements of public bidding must be awarded to

the lowest responsible bidder (General Municipal Law, §103). In determining the lowest bidder, the municipal agency charged with the function is rightfully concerned with the bidder's responsibility -- an elastic word which includes considerations of skill, judgment and integrity. Hence, the background of the bidder may be properly investigated by the municipal agency (Matter of J.N. Futia Co. v Office of Gen. Servs. of State of N.Y., 39 AD2d 136).

Unquestionably, the Board of Education, in determining the petitioner's responsibility, was entitled to take into account the criminal record of its principals (see Matter of Zara Contr. Co. v Cohen, 23 AD2d 718; cf. State Finance Law, §139-b; General Municipal Law, §103-b). Hence the Board of Education, upon finding that two of the stockholders of petitioner, owning between them

75%* of the corporate stock, had criminal records, could rationally determine that the petitioner was not the lowest "responsible" bidder.

Once a rational basis for that determination is found to exist, the court's power to interfere in the award of a contract arising out of the bidding process is ended. Reasonable men may differ as to the criteria which the municipal agency adopts in determining the responsibility of bidders, but it is the reason of the municipal agency, not the reason of the court, which prevails (Matter of Caristo Constr. Corp. v Rubin, 15 AD2d 561, affd

* One, a 50% stockholder, had been convicted in 1970 of the crime of falsifying information on a Federal Housing Administration loan application, and sentenced to six months in jail; he had also been charged in 1975 for driving while intoxicated, for which the disposition was a conditional discharge and $100 fine, which had been paid. The other stockholder, owning 25% of the stock, had been convicted in 1976 both of conspiracy, involving the obstruction of interstate commerce, and of income tax evasion; in 1970 he had also been convicted of possession of stolen property and fined $250.

10 NY2d 538; Matter of Kayfield Constr. Corp. v Morris, 15 AD2d 373, 379).

I see no grounds for the petitioner's claim that the board's action was irrational, because previous administrations of the board had not disqualified the petitioner from bidding and had awarded a contract to it. Surely, board policies are always subject to change, as conditions change; and no bidder can claim a vested interest in the bidding on the theory that new policies cannot bind a bidder who has previously performed a contract. To stultify the board by such a limitation thwarts the exercise of the function confided exclusively to it of properly providing for the transportation of the city's students.

Nor do I see on this record a pattern of discrimination by the board which prejudiced the petitioner. In the first instance, the character and extent of the criminal record of the petitioner's stockholders is a matter to be weighed

by the board; what the criminal record of other bidders may be is equally a matter for the board. A court should not substitute its judgment of what is or is not significant in the background of the bidders which bears critically on their responsibility. Certainly, the background of the principals of the petitioner provided reason enough for the petitioner's disqualification.

In any event, I cannot find any warrant in the provision of the judgment permitting the award of the contract to the petitioner on the condition that one of the two implicated stockholders shall sell his stock within six months and not participate in the affairs of the petitioner. That provision, it seems to me, clearly violates the rule that the court may not force the municipal agency by the manipulation of the bidder's stock ownership into accepting as the lowest responsible bidder one which has been found on rational grounds by the agency not to be responsible.

For these reasons, I dissent and vote to dismiss the petition.

DECISION OF THE COURT OF APPEALS

Order reversed, with costs, and petition dismissed for reasons stated in the dissenting memorandum by Mr. Justic JAMES D. HOPKINS at the Appellate Division (75 AD2d 831, 833-834).